

GAHC010153592022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./177/2022

MD. DILUWAR HUSSAIN AND ANR.
S/O- MD. IMAN ALI, R/O- VILL.-NARAMARI, P.S. NAGAON SADAR, DIST.
NAGAON, ASSAM

2: MD. RASHIDUL HOQUE
S/O- LATE NABI HUSSAIN
R/O- VILL.- PUB NARAMARI
P.S. NAGAON SADAR
DIST. NAGAON
ASSA

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE P.P., ASSAM

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : MR. D DAS(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 11-08-2023

1. Heard Mr. N.N.B. Choudhury, learned counsel for the appellants and Mr. D. Das, learned Addl. P.P. for the State.

2. This appeal is directed against the Judgment and Order dated 13.07.2022 passed by the learned Addl. Sessions Judge No. 3-cum-Special Judge, Nagaon in connection with Special NDPS Case No. 27/2021 convicting Md. Diluwar Hussain and Md. Rashidul Hoque (hereinafter referred to as A1 and A2) and sentencing them to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs. 1 lac with default stipulation u/s 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for short).

3. The genesis of the case was that on 21.02.2021 at about 11:38 PM, the Secretary of the Khatowal VDP informed the police over phone that while he along with the VDP members were patrolling around the Khatowal bazaar, they intercepted one pickup van with two occupants carrying three bags of suspected contraband. The SI Naren Chandra Rabha of Rupahihat P.S. immediately recorded the G.D. Entry and proceeded to the place of occurrence (PO in short) accompanied by OC, Inspector Pintu Pathak, Head Constable Madhab Kalita, UBC Abul Basar and ABC Golap Nath. In the PO and in presence of witnesses a search was made and three (3) bags were recovered from the vehicle. Two (2) packets of suspected *ganja* were found inside one green coloured bag, two (2) packets of suspected *ganja* were found inside one black coloured leather bag and one (1) packet of suspected *ganja* was found inside one green coloured trolley bag. All these five (5) bags were wrapped by 5 packets of black coloured polythene material. These bags were weighed with the help of a Digital Weighing Machine and the weight was found to be 52.30 kg. The vehicle of Tata Zip XL make and the *ganja* packets were seized in presence of witnesses at the PO. The appellants, A1 and A2 had collected the seized *ganja* from several places for transportation and sale. An FIR regarding this incident was lodged by S.I. Sri Naren Chandra Rabha (hereinafter referred to as informant) and was registered as Rupahihat P.S. Case No. 128/2021 u/s 20(b)(ii)(C) of the

NDPS Act and SI(P) Rana Patar was endorsed with the investigation.

4. The Investigating Officer (IO in short) embarked upon the investigation and on completion of investigation submitted charge-sheet against the appellants. On commencement of trial a formal charge u/s 20(b)(ii)(C) of the NDPS Act was framed and read over and explained to the appellants who adjured their guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 9 witnesses and the defence cross-examined the witnesses to refute the charges.

5. On the incriminating materials arising against them, several questions were asked to the appellants u/s 313(1)(b) of the Code of Criminal Procedure (Cr.PC for short) and the response of the appellants were recorded. The appellants answered to the queries in an evasive manner with answers like "false", "I don't know and "I am innocent."

6. The trial Court decided this case on the following points:-

"The point for determination is whether the accused persons, on 22.02.2021 at about 12:30 am at Uttar Khatowal Bazaar under Rupahihat PS of Nagaon district, in contravention of the provisions of the NDPS Act, 1985 or any rule or order made or condition of license granted thereunder, possessed 52.30 kg of Ganja which contravention involved commercial quantity and thereby committed an offence punishable under Section 20(b)(ii)(C) of the NDPS Act, 1985?"

7. It was held by the learned trial Court that:-

PWs-2 and 7 revealed that A2 was driving the vehicle and A1 was the owner of the seized articles. This has been substantiated by the evidence of PWs-3, 4 and 5 who deposed that A2 was driving the vehicle. PW-5 revealed during cross-examination that A1 told him that the bags contained clothes. These revelations clearly affirm that A1 was the owner of the seized *ganja* and was in conscious possession of the same. It was also held by the learned

trial Court that the appellants were apprehended at night and there is nothing in the evidence to show that A1 was not aware of the contents of the bags in the vehicle. Both the appellants failed to discharge their burden u/s 35 of the NDPS Act that they had no culpable mental state. It was observed that the appellants were not carrying any passengers at that time of night and the appellants took advantage of the prevailing situation of the pandemic of covid-19 and the curfew and lockdown imposed at that time. The appellants failed to discharge their statutory reverse burden. Conscious possession was proved beyond doubt as the appellants were caught carrying three bags of contraband in the vehicle.

8. The appellants relied on the following decisions:-

(i) *Vijay Pandey v. State of Uttar Pradesh*, reported in (2019)18 SCC 215.

(ii) *Union of India v. Mohan Lal and Another*, reported in (2016) 3 SCC 379.

9. It is submitted by the learned counsel for the appellants that inventory as prepared by the OC were not produced before the trial Court. The evidence of the seizure witnesses clearly depict that they have affixed their signatures on blank papers. The Memo No. of the seizure of the exhibits in the forwarding report is not similar to the Memo No. of the report of the same seized contraband. There is not even an iota of evidence that the samples were drawn in presence of witnesses. There is no certification by the Judicial Magistrate as mandated u/s 52A of the NDPS Act. The Ext.-6 is an application and not a certificate. The evidence reveals that the vehicle was intercepted on 21.02.2021 but the seizure was made on 22.02.2021. The Malkhana Register was not produced and the Sheristadar was not examined to prove the safe custody of the seized contraband. Neither inventory nor certificate of inventory was produced. The samples were not seized in presence of the appellants.

10. Regarding the seizure or regarding the lack of signature on the FIR, the prosecution had submitted that Ext.-1 is the GD Entry extract and Ext.-2 is the FIR. The GD Entry extract is the FIR and signature is not required as the FIR can be considered as a statement u/s 161 Cr.PC. The MR No. of the seized articles is 16/2021, so there is no mistake or dissimilarities in the Memo Nos.

On the anvil of these submissions the question that falls for consideration is whether the trial Court has erred by convicting the appellants.

11. To decide this case in its proper perspective, the evidence is once more reappraised.

12. The informant testified as PW-1 that on 21.02.2021, the VDP Secretary Guljar Hussain informed the OC of the Rupahihat P.S., over phone that they have noticed one pickup van at Uttar Khatowal which appeared to be suspicious. The OC then registered a G.D. Entry No. 416 dated 21.02.2021 and the OC Sri Pintu Pathak took the informant along with him to the PO at Uttar Khatowal accompanied by other police personnel. This witness identified the signature of the OC as Ext.-1(1) on the G.D. Entry extract.

13. The informant further deposed that they arrived at the Chariali (crossroads) of Uttar Khatowal and found the pickup van detained by the VDP. Inside the pick-up van they found 3 bags containing *ganja* packets. They recovered 5 packets of *ganja* weighing 52 kgs 30 grams. He (PW-1) prepared the seizure-lists in the presence of witnesses and weighed the suspected *ganja* with the help of Digital Weighing Machine. Thereafter, from the PO they proceeded to the police station along with the appellants and the seized articles. As it was late at night, he lodged the FIR on the following day and the FIR was registered as Rupahihat P.S. Case No. 128/2021 and S.I. Rana Pator was entrusted with the investigation. He proved the FIR as

Ext.-2. He identified the signature of the O/C as Ext.-2(1). He proved the seizure-lists as Exts.-3 and 4 and his signatures as Exts.-3(1) and 4(1).

14. Guljar Hussain was the VDP Secretary who informed PW-1 about the incident and he deposed as PW-4 that the appellants are known to him. The informant is also known to him. The incident occurred about a year ago at about 11 PM, at the cross-roads of Uttar Khatowal. At that time the VDP members were keeping vigil over the area. Seven VDP members were present and they noticed a van approaching from Sonai

Saidoria towards Juria. They stopped the vehicle and informed the OC, who sent SI Naren Ch. Rabha (informant) to the PO. The informant recovered three bags and he (PW-4) noticed *ganja* inside those bags. The police seized the *ganja* in his presence and he affixed his signature. This witness identified his signature as Ext.-3(2). He has admitted in his cross-examination that the seizure-list was blank when he affixed his signature on the seizure-list Ext.-3. A-2 was the driver of the seized vehicle. His signatures were taken by the OC, Pintu Pathak. He also admitted that the seized articles were not produced in the Court. He testified in his cross-examination that he did not know whether the seized articles were weighed in the police station or in the Court and he could not recall the weight of the seized articles. His statements and the statements of the other VDP members were recorded on the following day of the incident.

15. The evidence of PW-1 depicts that the contraband was seized in the P.O., whereas, the seizure witness, PW-4, failed to recall if the contraband was seized at the PO or in the P.S. Moreover it is a fact the VDP members cannot be considered as independent witnesses. He has failed to prove the seizure-list as he has claimed that Ext.-3 was blank, when he affixed

his signature.

16. Another VDP member Sahidulla deposed as PW-5 that the appellants are known to him. On the day of the incident, about a year ago, at about 10 PM, the VDP Secretary Guljar (PW-4) told him that the OC called him over phone and informed him that a van was approaching from Saidoria and all the seven members of the VDP party halted the vehicle. After sometime the OC arrived. Three bags were found inside the vehicle and they were told that the bags were made of fabric. The OC recovered *ganja* from the three bags and he seized the *ganja* and took the *ganja* to the police station along with the vehicle and the appellants who were in the vehicle. He saw the seized articles and affixed his signature Ext.-3(3) on the seizure-list.

17. Both PW-4 and PW-5 have admitted in their cross-examination that they have not produced any document in support of their claim that they were members of the VDP. PW-5 has stated in his cross-examination that he did not know why his signature was taken. He affixed the signature as he asked to do so. He did not know what was written in the seizure-list. A2 is the driver of the vehicle which was stopped. The bags were not opened at the PO. The bags along with the vehicle and the two occupants of the vehicle were taken to the police station. The distance between the PO and Rupahihat police station is around 9 kms. The VDP Secretary told them that the bags contained clothes. They restrained the vehicle for about 20-25 minutes before the police arrived. There were other three persons along with the seven VDP members at the time when the vehicle was intercepted. As it was dark, the police took their signatures on blank papers. His (PW-5's) statement was not recorded. Guljar informed the police that the vehicle was stopped as the police asked him to stop the vehicle. He did not know the weight of the *ganja* recovered. On the next day, the police called him

and other two VDP members Abul Kasem and Guljar to the police station and then the police told them that those bags contained *ganja*. He did not see the bags containing *ganja*.

18. Thus, the evidence of PW-5 contradicts the evidence of PW-1 that, PW-4 initially informed the OC about the approaching vehicle. His evidence also contradicts the evidence of the PW-1 that the contraband was seized at the P.O. PW-5's evidence depicts that the bags were opened in the police station and the bags contained clothes. PW-4 and PW-5 failed to prove the seizure lists where they had affixed their signatures.

19. The evidence of PW-1 and PW-4 is not substantiated by the evidence of PW-5. PW-5 has stated in his evidence-in-chief and cross-examination that the bags contained clothes. The police informed them that the bags contained *ganja*. The bags were not opened at the PO as it was dark and the bags along with the occupants of the vehicle were taken to the police station. Although PW-5 was a VDP member, his evidence does not at all incriminate the appellants. As stated by PW-5, there were other three persons, besides the VDP members. If three other persons were present, then why no endeavour was made by the investigating agency to include them as independent witnesses.

20. The other VDP member is Abul Kasem who testified as PW-6 that neither the complainant nor the occupants are known to him. The incident occurred almost a year ago, around 11:30 PM. At that time he along with the other VDP members were on duty in the market area of Uttar Khatowal. At that time two persons came in a vehicle from Saidoria side. They intercepted the vehicle and informed the OC of Rupohihat PS. The police came and recovered *ganja* from the vehicle and took the articles along with them. He identified his signature on the seizure-lists as Exts.-3 and 4. In his cross-examination too, this witness has

admitted that there were many people present at the PO. He gave his signature at the police station and he did not know what was written on the document when he affixed his signature. He arrived at the police station on the following day at around 9 AM. He could not remember who informed the police over phone about the recovery of *ganja*. Initially the In-charge of Garajan outpost arrived and after 2/3 minutes, the OC of Rupahihat arrived at the PO.

21. Thus it is clear from the evidence of the VDP members PWs-4, 5 and 6 that they affixed their signatures on the blank papers. This casts a shadow of doubt over the authenticity of the investigation conducted by the Investigating Agency. It cannot be ignored that PW-5 stated that the OC asked the VDP Secretary to intercept the vehicle which was approaching from Saidoria side, whilst on the contrary, the PW-1 stated that the VDP Secretary informed the OC about the approaching vehicle which appeared to be suspicious. The OC of Rupahihat PS Sri Pintu Pathak was not examined as witness causing a lapse in the prosecution. The evidence of PW-5 also depicts that he did not see the *ganja* at the PO. The bags were not opened at the PO as it was dark. This evidence is contradictory to the evidence of PW-1 (informant).

22. Another VDP member Rofikul Islam testified as PW-7 that A2 was a driver of the vehicle carrying *ganja* and A1 was the owner of the *ganja*. The incident occurred about a year ago, at around 10 PM. At that time he along with other VDP members were on duty in the market area of Uttar Khatowal. At that time, a vehicle came and they intercepted the vehicle and the VDP Secretary, Guljar Hussain (PW-4) informed the police. He heard that the police recovered *ganja* from the vehicle. The police took the articles with the vehicle and the accused along with them.

23. The evidence depicts that all the witness PWs-4, 5, 6 and 7 have stated that at the time of accident lockdown was imposed. PW-7 has admitted in his cross-examination that he heard from A-2 that he was the driver of the vehicle and A1 was the owner of the seized articles. When they intercepted the vehicle, they got the vehicle parked on the side of the road and many people assembled at the PO and after 10/12 minutes, the OC of the Rupahihat PS arrived. The police came and took photographs of the articles and passengers of the vehicle and thereafter they took the vehicle along with the occupants to the police station. This witness also did not see the seized articles in the Court. The failure of the prosecution to produce the seized articles to be identified by the witnesses thwarts the evidence. Although the witnesses have stated that they have affixed their signatures on blank papers, yet it was the duty of the prosecution to produce the seized articles to be identified by the witnesses. However, the cross-examination of PW-6 and PW-7 clearly reveals that the seized articles were not produced in the Court by the prosecution to be identified by the witnesses.

24. Fakhar Uddin Ahmed was also a VDP member and he has testified as PW-2 that on 21.02.2021 at about 11:37 PM, he was on VDP duty as a member of VDP of Uttar Khatowal. The appellants were in a Tata Magic vehicle and on suspicion they intercepted the appellants. They checked the vehicle and found three black coloured bags in the dickey. After checking the dickey, they found *ganja* inside the bags. The VDP Secretary, Guljar Hussain (PW-4) who was present at that time, immediately informed the police over phone regarding the incident. The police arrived at the PO and the police seized the bags and took the appellants, along with the seized articles and vehicle to the police station. The other seizure witness is Sohiful Islam who deposed as PW-3 that on the night of the incident, he was on VDP duty and at

around 11 PM a van approached. They stopped the vehicle and they found three bags inside the vehicle. After checking the bags they found suspected *ganja* inside the bags. The VDP then informed the police over phone and the OC of Rupahihat PS came and took the appellants and the offending vehicle to the police station. The police took his signature on a paper.

25. The IO, Rana Patar has testified as PW-8 that on 22.02.2021, he was working at Rupahihat police station. On that day an FIR was lodged by SI Naren Chandra Rabha and the OC of the Rupahihat P.S. registered the FIR and endorsed him to investigate the case. He has identified the signature of the OC Pintu Pathak on the FIR as Ext.-2(1). He has identified the proforma of the FIR as Ext.-PW8/P4 and the signature of the OC, Pintu Pathak as Ext.-P4(1). He, PW-8 further testified that the seized articles, the seizure-list, copy of FIR and the Case Diary were handed over to him. He examined the complainant and visited the PO. The complainant showed him the PO and the surroundings and he prepared the sketch-map, Ext.-PW-8/P5 and he proved his signature on the sketch-map as Ext.-P5(1). He further deposed that he recorded the statements of witnesses Fakiruddin, Rofiqul Islam and Sahidul Islam and prepared the inventory. The OC, Pintu Pathak applied for certification of correctness of inventory, photographs and samples of narcotic drugs u/s 52A of the NDPS Act. He proved the application filed by the OC, Pintu Pathak as PW-8/P6 and the signature of the OC as P6(1).

PW-8 further deposed that the inventory was signed and certified by the Judicial Magistrate, 1st Class, Nagaon and he (PW-8) submitted their prayer to the CJM through the P.I. Nagaon to verify the seizure-list and the seized articles on 22.03.2021 through the

application marked as Ext. PW-8/P7. He proved his signature as P7(1). He forwarded the appellants A1 and A2 to the Court of the Special Judge through forwarding letter Ext.-PW-8/P8. The Crime Branch, Nagaon forwarded the seized articles to the FSL, Guwahati and he collected the chemical examination report and submitted charge-sheet against the appellants u/s 20(b)(ii)(C) of the NDPS Act. He proved his signature on the charge-sheet as Ext.-9(1).

26. In his cross-examination the IO admitted that he was not present at the time when the seized articles were weighed. He did not record the statements of the seizure witnesses. He did not know whether the statements of the seizure witnesses were recorded in the police station or at the PO. The incident occurred at a cross-road, but he did not call the village Headman or any other inhabitant of the locality or record the statement of any shopkeeper. When he was assigned with the investigation, the seized contraband was handed over to him and he produced the contraband in the Court on the next date with the seizure-list. The contraband was kept in the police Malkhana before production at the Court. The Sheristadar is the custodian of the key to the Malkhana lock and an independent Malkhana register is maintained. On the night when the articles were kept in the Malkhana, he did not keep the Malkhana's keys with him. At that time several other NDPS cases were under investigation at Rupahihat police station.

27. The IO, PW-8 has admitted in his cross-examination that the letter forwarded to the Forensic Science Laboratory for examination of samples of the contraband was sent vide Memo No. IV/167/2021/1310-11. He has also admitted in his cross-examination that as per the report of the Forensic Science Laboratory their Memo No. was shown as No. IV/167/2021/1309 dated 23.02.2021. He has identified the forwarding letter sending samples as Ext. PW8/D2 and the signature of the Superintendent of Police Gaurav Upadhyay as Ext.

D2(1). He has admitted that no date is mentioned on Ext.-D2. However, he has denied the suggestion of the defence that as the articles seized in connection with this case were not sent for forensic examination therefore, the memo numbers of the sample does not tally in connection with this case. He (PW-8) prepared a sketch map whilst the informant Sri Naren Ch. Rabha who was the Seizing Officer did not prepare any sketch-map (at the time of seizure).

28. A close scrutiny of the evidence of the IO clearly reveals that the investigation was conducted in a slipshod manner. The defence has projected that the Malkhana Register was not exhibited and it has been fervently and vehemently argued by the defence that there is every doubt that the contrabands may have been manipulated. The Memo Nos. of the forwarding letter to the forensic laboratory and the Memo No. of the report of the chemical examination does not tally. One Memo No. is IV/167/2021/1310-11 and the memo number mentioned on the report is IV/167/2021/1309 dated 23.02.2021. It is also argued by the defence that several investigations were carried on in the Rupahihat police station relating to contraband substance and there is every possibility that some other articles have been sent in connection with this case. This extends the benefit of doubt to the appellants.

29. Sri Chandan Das is the Scientific Officer of the Forensic Laboratory who has testified as PW-9 that on 20.04.2021, he received a parcel from the Director in connection with this case for necessary examination. The parcel consisted of one exhibit enclosed in the sealed envelope covered and the seal was found to be illegible.

The description of the articles are:

One sealed envelope marked as Ext.-A having a closed polythene packet containing 30

grams of dry plant materials, marked as DN-177/2021. On careful examination of the exhibit, following United Nations Drug Testing Manual, he found as follows:

The Ext. DN-177/2021 gave positive test for cannabis (*ganja*). The report was submitted by him on 09.01.2001. His report along with remnants of the exhibits was returned to the sending authority by his Director. He proved his signature as Ext.- D1/PW-9. He proved the forwarding letter dated 04.05.2021 as Ext.-P10/PW-9. The Director of the Forensic Laboratory Sri Gajendra Nath Deka forwarded his report to the OC of Rupahihat PS. He identified the signature of the Director as Ext.-P10(1).

30. In his cross-examination the PW-9 has stated that he has not mentioned in his report that the entire sample was cannabis. He received a request letter vide Memo No. IV/167/2021/1309 dated 23.02.2021 from the IO. He has also admitted that he has mentioned the letter No. IV/167/2021/1309 dated 23.02.2021 in his report dated 09.04.2021, marked as Ext.-D1. He has also admitted in his cross-examination that he has not described the procedure of examination of the sample in his report.

31. The dissimilarity in the Memo number mentioned by PW-9 of the Memo No. IV/167/2021/1309 dated 23.02.2021 forwarding the seized contraband for chemical examination and the Memo No. IV/167/2021/1310-11 dated 23.02.2021 mentioned in the SP's letter has been impugned by the defence, stating that there must have been a misplacement of the seized articles which resulted in the dissimilarities in the Memo numbers which has been mentioned vide Ext.-P10/PW9 that the Memo No. of the Rupahihat P.S. received by the Directorate of Forensic Science in connection with this case was IV/167/2021/1309 dated 23.02.2021 which was sent by Special Messenger whereas the

forwarding letter marked as Ext.-D2/PW8 sent by the SP clearly reveals that the Memo number is not the same number as mentioned in the Forensic Report but the Memo No. is IV/167/2021/1310-11 dated 23.02.2021. This apparent difference in the Memo numbers depict that the investigation and the prosecution was indeed conducted in an apathetic manner and the failure of the prosecution to produce the Malkhana Register in the Court and the failure of the IO to ascertain that the samples were kept in safe custody casts a shadow of doubt over the veracity of the prosecution and the investigation. The procedure adopted by the Seizing Officer in drawing the sample has not been described in the evidence of the Seizing Officer. Here in this case the Seizing Officer appears to be the PW-1, but he has not specifically mentioned how the seizure was conducted. He has not mentioned the amount of samples drawn from each of the packet. The evidence is silent about the place where the seizure of the articles were made and in what manner the articles were seized. The seizure witnesses have also not supported the prosecution case. Except PW-1, not a single witness, stated that the contraband was seized at the P.O.

32. It has been held by the Hon'ble Supreme Court in *Vijay Pandit's case (supra)* that:-

“The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated. The observations in *Vijay Jain vs. State of Madhya Pradesh*, (2013) 14 SCC 527, as follows are considered relevant :

“10. On the other hand, on a reading of this Court's judgment in Jitendra's case, we find that this Court has taken a view that in the trial for an offence under the *NDPS Act*, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the

prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the **NDPS Act** particularly when the panch witnesses have turned hostile. Again, in the case of Ashok (supra), this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its nonproduction and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.”

33. In this case at hand apart from the difference in the memo numbers projected by the defence, the other discrepancy is that the seized items were not produced in the Court to be identified by the witnesses in whose presence the articles were seized. This is also another discrepancy in the evidence. The Standing Order 1/89 was not followed while drawing samples. The seizure lists Exts.-3 and 4, clearly depicts that five (5) packets were seized from the bags but only one (1) sample was forwarded to the Forensic Laboratory. There is no evidence of any duplicate sample being drawn from packets seized in connection with this case. No certification by the Judicial Magistrate from the Chief Judicial Magistrate has been proved in this case.

34. The learned counsel for the appellants has relied on the decision of the Hon’ble Supreme Court in *Union of India v. Mohanlal and Another (supra)* wherein it has been observed that:-

“**12. Section 52-A(1)** of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“**2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be**

drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. [Section 52A](#) as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“[Section 52A](#) : Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under [section 53](#), the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the [Indian Evidence Act, 1872](#) (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic

substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]”

15. It is manifest from **Section 52A (2)(c)** (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under **Section 53** who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to **Section 52-A(4)** of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of **Section 52-A** above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

31.1 No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under **Section 53** of the Act. The officer concerned shall then approach the Magistrate with an application under **Section 52A(ii)** of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading ‘seizure and sampling’. The sampling shall be done under the supervision of the magistrate as discussed in paras 15 and 19 of this order.”

35. In the instant case, the investigation agency neither followed the procedure laid down under Section 52A of the NDPS Act nor the Standing Order 1/89. To sum up, due to the

discrepancies in the prosecution and investigation, as well as the contradictions in the evidence of the witnesses and the failure the prosecution to produce even a single independent witness; it is held that the prosecution has failed to prove this case beyond reasonable doubt. Therefore, the statutory presumption does not operate against the appellants.

36. It has been held by the Hon'ble Supreme Court in *Noor Aga Vs. State of Punjab* MANU/SC/2913/2008 that:-

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event that circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability ‘on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established .

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.”

37. In the instant case, it has already been held in my foregoing discussions that there are too many discrepancies in the evidence and the flaws in the prosecution which causes a dent in the evidence. The foundational facts in fact were not proved beyond reasonable doubt. The argument that the appellants failed to discharge their burden of conscious possession of the contraband has to be brushed aside.

- 38.** I would like to reiterate that the procedural requirements are required to be strictly complied with. The investigation agency failed to scrupulously follow the procedure.
- 39.** The appeal is hereby allowed.
- 40.** The impugned judgment and order is set aside and both the appellants A1 and A2 are acquitted from the charges u/s 20(b)(ii)C of the NDPS Act on benefit of doubt. Both the appellants are to be set at liberty, if they are not wanted in any other case.
- 41.** Sureties stand discharged.
- 42.** Pending application(s), if any, stands disposed of.
- 43.** Send back the LCR.

JUDGE

Comparing Assistant